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CITATION

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 805

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN BREUNER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above-entitled case.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 46-52) are not officially reported. The opinion of the court below (R. 108-111) is reported at 179 F. 2d 685.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1950. (R. 107, 112.) An

amended opinion amending the judgment was filed on February 6, 1950. (R. 107, 112.) By order of the Chief Justice, dated April 14, 1950, the time for filing a petition for a writ of certiorari was extended to and including May 7, 1950. (R. 113.) The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether in computing its excess profits tax credit, taxpayer, which filed its income tax returns on the installment basis under Section 44 (a) of the Internal Revenue Code, and which elected under Section 736 (a) to compute its excess profits net income on the accrual basis, may include its uncollected installment profits, which had not been subjected to income tax, in its "accumulated earnings and profits" under Section 718 (a)(4) of the Internal Revenue Code for the purpose of determining its equity invested capital under Section 718.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and relevant regulations are set forth in the Appendix to the petition for a writ of certiorari in *Busch's Kredit Jewelry Co., Inc.* v. *Commissioner,* No. 804, this Term, pp. 18-25, and are incorporated herein by reference.

STATEMENT

Taxpayer, a California corporation with principal office at Oakland, California, filed its excess profits tax return for the fiscal year ended January

31, 1943, with the Collector of Internal Revenue for the First District of California. It kept its books on an accrual basis of accounting, but for income tax purposes reported deferred-payment sales on the installment basis under Section 44 (a) of the Internal Revenue Code. As of January 31, 1944, it established its qualifications, under Section 736 (a) of the Internal Revenue Code, to accrue income from installment sales for excess profits tax purposes; it elected to do so, and on its tax return for the fiscal year 1943 it computed its excess profits tax credit and credit carry-overs on the basis of invested capital. (R. 47.) Gross profits on the unpaid balances of its installment accounts receivable at the commencement of preceding fiscal years were as follows (R. 47):

February 1, 1940	$590,950.06
February 1, 1941	693,289.38
February 1, 1942	817,324.02

In the determination of taxpayer's excess profits tax credit for the fiscal year 1943 the Commissioner did not include these gross profits in taxpayer's invested capital. (R. 48.) The Tax Court sustained the Commissioner's determination (R. 48-50).

The Court of Appeals affirmed that portion of the Tax Court's determination which excluded from "accumulated earnings and profits" those uncollected installment profits outstanding on February 1, 1940, which were wholly attributable to sales

made in a taxable year or years beginning before January 1, 1940, and which thus had never been subjected to either income or excess profits taxation. (R. 110.) The Court of Appeals, however, determined that those uncollected installment profits which were attributable to sales made during or after the taxable year beginning after January 1, 1940, and which had thus been accrued for the purposes set forth in Section 736(a), were includible in the "accumulated earnings and profits" even though not reflected in the computation of taxpayer's income tax. (R. 110-111.) Pursuant to this conclusion, the Court of Appeals remanded the case to the Tax Court for a determination as to what portion of the uncollected installment profits outstanding on February 1, 1941, and February 1, 1942, were attributable to sales made in taxable years beginning prior to January 1, 1940. (R. 111.) In so far as the Court of Appeals determined that any portion of the uncollected installment profits was includible in "accumulated earnings and profits" solely by virtue of the Section 736(a) election the Court held the pertinent Treasury Regulation invalid.

REASONS FOR GRANTING THE WRIT

This petition raises precisely the same question as that presented in the Government's petition, filed simultaneously herewith, in *Busch's Kredit Jewelry Co., Inc.* v. *Commissioner,* No. 804, and

the reasons for granting the writ are set forth in the petition in the *Busch's Kredit Jewelry Co.* case.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 938439 697